Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Developing a Unified Intercarrier Compensation Regime T-Mobile *et al.* Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs	)	CC Docket No. 01-92

PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION

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T-Mobile USA, Inc. ("T-Mobile") requests that the Commission clarify the Declaratory Ruling and Report and Order in the above-captioned proceeding ("*Order*")[1] by spelling out the operation of the pricing rules that apply: (1) during the period that reciprocal compensation negotiations between incumbent local exchange carriers ("ILECs") and commercial mobile radio service ("CMRS") carriers are pending; and (2) in any proceedings related to the application of wireless termination tariffs to past periods. This request for clarification is offered in support of the Commission's goals as stated in the *Order* and to facilitate enforcement of the Commission's pricing rules.[2]

[1] *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, FCC 05-42 (Feb. 24, 2005) ("*Order*").

[2] Although this petition does not challenge the *Order's* refusal to declare the ILECs' unilateral wireless termination tariffs illegal under Sections 251 and 252 of the Communications Act of 1934, T-Mobile does not waive potential appellate claims relating to the denial of its requested declaratory relief.

I. INTRODUCTION AND SUMMARY

As a nationwide CMRS carrier seeking to compete with ILECs in the provision of mass market local exchange services, T-Mobile must secure reasonable rates and terms from ILECs for the delivery and termination of its customers' wireless calls. T-Mobile accordingly commends the Commission for taking steps in the *Order* to ensure that ILECs cannot unilaterally impose unreasonable rates on wireless carriers to terminate wireless traffic.

T-Mobile supports the Commission's decision in the *Order* to amend Section 20.11 of its rules to prohibit LECs from unilaterally imposing compensation obligations for non-access CMRS traffic pursuant to tariff. T-Mobile also recognizes that Section 252 of the Act does not require CMRS providers to negotiate interconnection agreements or submit to arbitration, and Section 251(b)(5) of the Act does not impose reciprocal compensation obligations on CMRS providers. As such, the Commission concluded that another mechanism was needed to enable LECs to negotiate reasonable compensation with CMRS providers for the termination of wireless traffic.[3] T-Mobile supports the Commission's intent to provide a mechanism to ensure that CMRS providers secure reasonable reciprocal compensation rates. T-Mobile, however, seeks clarification of two points.

First, the prospective relief granted by the *Order* potentially raises issues that require Commission clarification. Specifically, the Commission established interim reciprocal compensation requirements "consistent with those already provided in section 51.715 of the Commission's rules."[4] Two of the three alternative pricing rules in Section 51.715 are based on Section 51.707 of its rules. The Eighth Circuit Court of Appeals, however, in *Iowa II*, struck

[3] *See Order* ¶¶ 14-15.

[4] *Id.* ¶ 16.

down the "proxy" pricing rules in Section 51.707 on the grounds that the Commission lacks jurisdiction to set actual intrastate rates that state commissions can apply and on other grounds specific to wireline carriers.[5] In *Iowa I*, however, the same court previously upheld as to CMRS traffic the Commission's authority, under Section 332(c)(1)(B) of the Act, to impose on LECs other termination pricing rules that the court struck down as to wireline traffic on jurisdictional grounds.[6] Although the Commission properly relied upon *Iowa I* as support for the prospective relief in the *Order*, it should clarify that it has the authority, under Sections 332(c)(1)(B) and 201(a) of the Act, to impose interim CMRS traffic termination pricing rules on LECs that include the proxy pricing rules struck down in *Iowa II*.

Second, in denying relief as to the lawfulness of ILEC wireless termination tariffs, the Commission made "no findings regarding specific obligations … to pay any tariffed charges."[7] T-Mobile requests that the Commission affirmatively state that the pricing standards of Section 51.705 of its rules govern any proceedings to enforce or challenge the ILECs' tariffs for past periods, irrespective of whether the negotiation and arbitration procedures of Sections 251 and 252 of the Act have been invoked or the nature of the proceedings.

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[5] *Iowa Utilities Board v. FCC*, 219 F.3d 744, 756-57 (8th Cir. 2000) ("*Iowa II*"), *aff'd in part and rev'd in part on other grounds sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

[6] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) ("*Iowa I*"), *vacated and remanded in part on other grounds sub nom. AT&T Corp. v. Iowa Utilities Board v. FCC*, 525 U.S. 366 (1999).

[7] *Order* ¶ 10 n.40.

II. THE COMMISSION HAS THE AUTHORITY, UNDER SECTIONS 201 AND 332, TO IMPOSE THE PROXY PRICING RULES AS INTERIM WIRELESS TERMINATION PRICING RULES.

A. The Prospective Relief Granted In The *Order* Is Based In Part On A Proxy Pricing Rule Vacated In *Iowa II*.

In ordering prospective relief under the *Order*, the Commission concluded that Section 51.715 of the rules would serve as interim pricing rules to be applied pending negotiation or arbitration of reciprocal wireless termination rates. Section 51.715 provides three alternative bases for interim reciprocal compensation rates: (1) rates established by the relevant state commission based on forward-looking cost studies; (2) rates established by the relevant state commission consistent with the default price ranges and ceilings set forth in Section 51.707 of the Commission's rules; or (3) where the state commission has not set rates under either of those mechanisms, the default ceilings for end office switching, tandem switching "and transport (as described in § 51.707(b)(2))."[8]

Section 51.707 was one of the proxy pricing rules struck down by the Eighth Circuit in *Iowa II*. The court concluded as to those rules that: (1) the Commission lacks jurisdiction to set actual rates for state commissions to apply; and (2) proxy rates that rely on the hypothetical most efficient carrier and avoided cost rationales violate Section 252.[9] As a result, when, as is typical, a state commission has not conducted the cost studies contemplated by the first alternative set forth in Section 51.715, no interim pricing provisions likely could be applied under Section 51.715 to a particular ILEC pending resolution of the negotiations and/or arbitration of the proper wireless termination rates contemplated by the *Order*. The Commission could readily

[8] 47 C.F.R. § 51.715(b).

[9] *Iowa II*, 219 F.3d at 757.

resolve the ambiguity stemming from the vacating of Section 51.707, however, simply by affirming its authority under Sections 332(c)(1)(B) and 201(a) of the Act to impose pricing rules on ILECs terminating CMRS traffic, including the requirements of Section 51.707.

B. *Iowa I* And *Iowa II* Affirm Commission Authority To Establish Pricing Rules For ILEC Termination Of Wireless Traffic.

The Eighth Circuit's review of the Commission's pricing rules in *Iowa I* and *Iowa II* illustrates the scope of the Commission's authority under Section 332(c)(1)(B) to impose the interim pricing rules contained in the *Order*. In *Iowa I*, the court vacated certain pricing rules, including Section 51.707 and the other proxy pricing rules, that had been promulgated pursuant to the Commission's authority over local exchange competition under Sections 251 and 252 of the Act. The court's decision was based on its view that those rules intruded on the states' authority over intrastate telecommunications, in violation of Section 2(b) of the Act, and that nothing in Sections 251 and 252 provided an exception to Section 2(b).[10]

Importantly, as the Commission noted in the *Order*, however, the court in *Iowa I* also held that, "because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers," the Commission "has the authority to issue the [pricing] rules of special concern to the CMRS providers"[11] and upheld certain of the otherwise vacated pricing rules as to the provision of ILEC services and facilities to CMRS providers.[12] The court also

[10] *Iowa I*, 120 F.3d at 793-800. *See* 47 U.S.C. § 152(b).

[11] *Iowa I*, 120 F.3d at 800 n.21.

[12] *Id.* (cited in the *Order* ¶ 14 n.58). Some of the pricing rules at issue, including Section 51.707, were not included in the court's list of pricing rules "of special concern to the CMRS providers" and thus were not upheld as to CMRS traffic. *Id*. at 800 & n.21.

pointed out that the states are precluded from entry and rate regulation of CMRS providers by Section 2(b) of the Act.[13]

On appeal, the Supreme Court, in *AT&T*, reversed the Eighth Circuit's vacating of the pricing rules, concluding that the Commission "has jurisdiction to design a pricing methodology" to be applied by state commissions, but did not comment on the lower court's exception for CMRS traffic.[14] On remand from *AT&T*, the Eighth Circuit in *Iowa II* acknowledged the Supreme Court's reversal of its vacatur of the pricing rules, including the proxy rules, but nevertheless vacated the proxy rules again, concluding that those rules established specific intrastate rates and that the Commission does not have authority under Sections 251 and 252 of the Act "to set the actual prices for the state commissions to use."[15] The court explained that setting specific wireline traffic rates "intrudes on the states' right to set the actual rates pursuant to § 252(c)(2)."[16] Unlike *Iowa I*, the Commission's authority to establish proxy pricing rules for CMRS traffic was not raised in *Iowa II*, and the applicability of its vacatur of Section 51.707 and the other proxy rules to such traffic was not addressed.[17]

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[13] *Id*. at 800 n.21 (citing 47 U.S.C. § 152(b), which exempts the provisions of Section 332 from the preclusion of Commission authority over intrastate communications).

[14] *AT&T Corp. v. Iowa Utilities Board v. FCC*, 525 U.S. 366, 385 (1999) ("*AT&T*").

[15] *Iowa II*, 219 F.3d at 757. In *Iowa I*, the court had found that the pricing rules covered intrastate services. *Iowa I*, 120 F.3d at 800.

[16] *Iowa II*, 219 F.3d at 757. The court also vacated the proxy rules because the proxy rates rely on the hypothetical most efficient carrier and avoided cost rationales that violate Section 252. *Id.*

[17] *See id.* at 756-57.

C. The Eighth Circuit's Rationale For Upholding The Pricing Rules As To CMRS Traffic Applies Equally To The Proxy Rules, Including Section 51.707.

The *Iowa I* and *II* decisions demonstrate that the Commission has clear authority under Section 332(c)(1)(B) to impose on LECs terminating CMRS traffic the same proxy pricing rules, including Section 51.707, that were struck down in *Iowa II* on jurisdictional and Section 252 grounds. Nothing in the Eighth Circuit's discussions in *Iowa I* or *Iowa II* suggests that its basis for upholding certain pricing rules as to CMRS traffic in *Iowa I* -- Section 332(c)(1)(B) of the Act -- does not extend to the "set[ting of] actual prices" for CMRS traffic.[18]

The Commission's authority under Section 201(a) of the Act, which is incorporated in Section 332(c)(1)(B),[19] to "establish … charges applicable" to LEC-CMRS interconnections is unqualified.[20] Moreover, as pointed out in *Iowa I*, the states are precluded from entry and rate regulation of CMRS providers by Section 2(b) of the Act.[21] Thus, unlike the case of

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[18] *Id.* at 757. *See Iowa I*, 120 F.3d at 800 n.21.

[19] 47 U.S.C. §§ 332(c)(1)(B), 201(a).

[20] *See American Tel. & Tel. Co. and the Bell System Operating Companies Tariff F.C.C. No. 8*, 93 F.C.C.2d 739, 758-59, 761-62 (1983), *aff'd mem. sub nom. GTE Sprint Communications Corp. v. FCC*, 733 F.2d 966 (D.C. Cir. 1984) (Commission may ensure interconnection at reasonable rates under Section 201(a)); *Applications for Renewal of License filed by United Telephone Co.*, 48 F.C.C.2d 581, 582 (ALJ Ehrig 1973), *aff'd*, 47 F.C.C.2d 127 (1974) (Commission may prescribe just and reasonable ILEC interconnection charges to radio paging services under Section 201(a)). Section 201(a) provides such authority "in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). The "hearing" requirement of Section 201(a) is satisfied by a rulemaking proceeding establishing the criteria under which a carrier must interconnect to provide through service. *See, e.g., Lincoln Tel. & Tel. Co. v. FCC*, 659 F.2d 1092, 1100 n.43, 1103-04 & n.61 (D.C. Cir.1981); *Access Charge Reform*, 19 FCC Rcd 9108, 9138 & n.216 (2004), *recon. pending*.

[21] *Iowa I*, 120 F.3d at 800 n.21 (citing 47 U.S.C. § 152(b), which exempts the provisions of Section 332 from the preclusion of Commission authority over intrastate communications).

interconnected wireline traffic, the setting of reciprocal pricing rules for interconnected CMRS traffic could not "intrude[] on the states' right to set the actual rates."[22] *Iowa I* therefore fully supports the Commission's authority to apply the proxy pricing rules to interconnected wireless traffic under Sections 332(c)(1)(B) and 201(a), and *Iowa II* does not alter or undermine that authority.

Accordingly, the Commission, citing its authority under Sections 201(a) and 332(c)(1)(B), should clarify that, in applying the interim pricing requirements of Section 51.715 pursuant to the *Order*, cross references to Section 51.707 should be construed to incorporate all of the provisions of that regulation as originally promulgated, but only as to CMRS traffic covered by the interim pricing requirements of the *Order*. The Commission should incorporate by reference the basis for the proxy transport and termination rates established in the *First Local Competition Order*.[23] The Commission's reliance on the rationale for the proxy rates in the *First Local Competition Order* as an interim remedial measure should be granted great deference.[24]

III. THE COMMISSION SHOULD FIND THAT SECTION 51.705 OF ITS RULES GOVERNS PROCEEDINGS REGARDING ILEC UNILATERAL WIRELESS TERMINATION TARIFFS FOR PAST PERIODS.

In the *Order*, the Commission held that "a tariffed arrangement would not be unlawful *per se* under the current rules," but it made "no findings regarding specific obligations of any

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[22] *Iowa II*, 219 F.3d at 757.

[23] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15891-92, 15905-08, 15909-11, 16026-28, *recon.*, 11 FCC Rcd 13042 (1996) (subsequent history omitted) ("*First Local Competition Order*").

[24] Courts have repeatedly held that "agency discretion is often at its zenith when the challenged action relates to the fashioning of remedies" (*Pub. Util. Comm. v. FERC*, 988 F.2d 154, 163 (D.C. Cir. 1993)), including "interim compensation arrangements." *First Local Competition Order*, 11 FCC Rcd at 16030 & n.2548.

customer of any carrier to pay any tariffed charges."[25] It also declined to "decide whether such tariffs satisfy the statutory requirements of [Section 251(b)(5) of the Act]."[26] Thus, although the Commission determined that the unilateral filing of ILEC tariffs was not an impermissible procedure for setting wireless transport and termination rates, it did not explicitly address the substantive issue of how to assess the validity of the tariffed rates. Accordingly, the Commission should clarify that the substantive requirements for rates contained in wireless termination tariffs on file in past periods are no different from the substantive requirements that would apply to reciprocal compensation rates set pursuant to the negotiations and arbitrations required by the prospective relief portion of the *Order*.

As the Commission contemplated in its comment about making "no findings regarding specific obligations of any customer," ILECs can be expected to file claims for past periods based on their wireless termination tariffs in various fora. T-Mobile urges the Commission to clarify the coverage of its own rules as to these claims. Specifically, because Section 51.705 of the Commission's rules was in effect when all of the unilateral wireless termination tariffs initially were filed, its standards govern ILEC claims under the tariffs. Section 51.705 provides that ILEC transport and termination rates will be established at the election of the state commission on the basis of: (1) forward-looking costs, using a cost study conducted under Sections 51.505 and 51.511; (2) the default proxies in Section 51.707; or (3) a bill-and-keep arrangement as provided in Section 51.713.[27] The Commission's decision that unilateral ILEC wireless termination tariffs constituted a lawful mechanism to set rates for past periods cannot

[25] *Order* ¶ 10 n.40.

[26] *Id.* ¶ 12 n.49.

[27] 47 C.F.R. § 51.705(a).

mean that any tariffed rate was necessarily lawful under Sections 332(c)(1)(B) and 201(a) of the Act. Some standard for assessing those tariffs is required, and Section 51.705 is the only pricing rule that was applicable when the tariffs were filed.

The Commission's local competition rules, including its pricing rules, may be enforced in complaint proceedings.[28] Accordingly, the Commission should clarify that, in assessing the validity of ILEC wireless termination tariff rates for past periods, state commissions must apply the pricing rules in Section 51.705 of the Commission's rules.[29] It is irrelevant that there were no negotiations or arbitration proceedings conducted under Sections 251 and 252 in connection with these tariffs. As explained above, *Iowa I* demonstrates that Section 51.705, like all of the Commission's pricing rules, is valid as to CMRS traffic under Section 332(c)(1)(B) of the Act. Moreover, Section 51.705 was not struck down in *Iowa II*.

Furthermore, *TSR Wireless*, a Section 208 complaint case affirmed by the D.C. Circuit in *Qwest*, demonstrates that the Commission's pricing rules may be applied to CMRS traffic retroactively, irrespective of whether any Section 251/252 proceedings were invoked. In *TSR Wireless*, one-way paging providers TSR Wireless, LLC and Metrocall, Inc. filed complaints alleging that ILECs had charged them for the origination of paging calls in violation of Section 51.703(b), which prohibits LECs from charging other carriers for originating calls. The Commission: (1) held that the ILECs were bound by the decision in *Iowa I* upholding Section

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[28] *CoreComm Communications, Inc., and Z-TelCommunications, Inc. v. SBC Communications Inc.*, 18 FCC Rcd 7568, 7573-76 (2003), *recon. denied*, 19 FCC Rcd 8447 (2004); *TSR Wireless, LLC v. US WEST Communications, Inc.*, 15 FCC Rcd 11166 (2000) ("*TSR Wireless*"), *aff'd Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001) ("*Qwest*").

[29] Although such claims might not be filed with state commissions in the first instance, questions as to the validity of the tariffs or their rates undoubtedly would be referred to the commissions.

51.703(b) and other pricing rules as to CMRS traffic under Section 332(c); (2) rejected the ILECs' defense that the paging carriers could enforce the LECs' interconnection obligations only through the negotiation and arbitration provisions of Sections 251 and 252; and (3) granted the complaints.[30]

In affirming *TSR Wireless*, the court in *Qwest* confirmed that the decision in *Iowa I* upholding the validity of Section 51.703(b) as applied to CMRS traffic on the basis of Section 332(c)(1)(B), "wholly independent of" Sections 251 and 252, bound the ILECs.[31] The court explained that Section 251/252 procedures are not required to enforce "a rule so grounded."[32] The court noted that, although Section 332 had not been cited by the Commission in the *First Local Competition Order* in promulgating Section 51.703(b), because that provision "is validated by … [Section 332], then [the complaint remedy] is indisputably available."[33] Section 51.705 clearly covers CMRS "telecommunications traffic"[34] and thus is equally "grounded" in Section 332(c)(1)(B) of the Act and may be applied "wholly independent of" Section 251/252 proceedings.

Accordingly, the Commission should find that Section 51.705 was fully applicable to the ILEC wireless termination tariffs from the date of its promulgation, irrespective of whether

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[30] *TSR Wireless*, 15 FCC Rcd at 11173-75, 11182-83.

[31] *Qwest*, 252 F.3d at 463-64.

[32] *Id.* at 464.

[33] *Id.* at 465. *See also Cellexis Int'l, Inc. v. Bell Atlantic NYNEX Mobile Systems, Inc.*, 16 FCC Rcd 22887, 22890-91 (2001) (CMRS provider's claim of unreasonable denial of interconnection under Sections 332(c)(1)(B) and 201(a) of the Act is independent of the existence of an interconnection agreement).

[34] 47 C.F.R. § 51.705(a).

Section 251/252 proceedings have been invoked, and that it must be applied in any state commission proceeding regarding the enforcement or application of the tariffs for past periods. As in the case of the interim pricing requirements of Section 51.715, discussed in Part II above, the Commission, citing its authority under Sections 201(a) and 332(c)(1)(B), also should clarify that, in applying the Section 51.705 pricing requirements, cross references to Section 51.707 should be construed to incorporate all of the provisions of that regulation as originally promulgated, but only as to CMRS traffic.

IV. CONCLUSION

In order to ensure that the Commission's preference for contractual arrangements for non-access CMRS traffic is readily implemented under the *Order*[35] and to uphold the scope of its pricing rules, it should clarify that: (1) in applying the interim pricing requirements in Section 51.715 of the Commission's rules, references to Section 51.707 should be construed to incorporate all of the provisions of that regulation as originally promulgated, but only as to CMRS traffic covered by the interim pricing requirements of the *Order*; and (2) the requirements of Section 51.705, also incorporating the provisions of Section 51.707 as to CMRS traffic, apply

[35] *Order* ¶ 14.

to any proceedings regarding the enforcement or application of the ILECs' wireless termination tariffs for past periods.

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